

Internal Revenue Service  
**memorandum**

CC:IL-N-9388-89

Br2:RLOsborne

date: **SEP 11 1989**

to: District Counsel, Dallas SW:DAL  
Attention: Gary Kallevang

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject: [REDACTED]

This memorandum responds to your August 17, 1989, request for technical advice.

ISSUE

1. Which entity is the proper entity to execute waivers of the statute of limitations on assessing the [REDACTED] corporate group?

CONCLUSION

1. The proper entity to execute waivers of the statute of limitations on assessing the [REDACTED] corporate group is [REDACTED], a Delaware corporation.

FACTS

[REDACTED] (" [REDACTED] ") was a Texas corporation with twelve subsidiaries. [REDACTED] was the common parent of the group, which filed income tax returns on a consolidated basis. In order to change from a Texas corporation to a Delaware corporation, on [REDACTED] [REDACTED] formed a wholly-owned subsidiary, [REDACTED] (" [REDACTED] "), a Delaware corporation, and on [REDACTED] [REDACTED] merged into [REDACTED]. Both [REDACTED] and [REDACTED] have the same EIN.

The Examination Division is examining the pre-merger years [REDACTED], [REDACTED] and [REDACTED], of the [REDACTED] group. Exams would like more time to complete the audit. The statute of limitations will expire on [REDACTED]. Exams has obtained Forms 872A executed by an officer of " [REDACTED] ". We understand that the officer is an officer of [REDACTED]. You have also informed us by phone that Exams has obtained waivers executed by that corporation as transferee on Forms 970. Advice is requested as to whether the proper party executed these consents.

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DISCUSSION

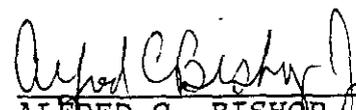
In the case of Southern Pacific Co. v. Commissioner, 84 T.C. 875, 84 T.C. 395 (1985), there was a reverse acquisition, described in Treas. Reg. § 1.1502-75(d)(3)(i) or downstream merger, described in Reg. 1.1502-75(d)(2)(ii) (it is not clear which) in which the old common parent went out of existence. There the Tax Court ruled that the new common parent became the agent for the group for both future and past years. The merger in the instant situation appears to be a downstream merger. Accordingly, under the Southern Pacific decision, the proper party to execute Forms 872A is the new common parent, [REDACTED]. While the Forms 872A obtained by Exams do not specify that the executing corporation was [REDACTED], as opposed to [REDACTED], the name set forth is the name of the Delaware corporation (as well as the name of the Texas corporation). Moreover, you have confirmed to us by phone that the signing officer was an officer of the Delaware corporation at the time he signed the forms. Therefore, in our opinion, the Forms 872A which Exams has obtained should suffice.

We also concur in Exams' decision to obtain transferee waivers as a safety measure. We note that the Court in Southern Pacific viewed the transaction in that case as a reverse acquisition, while the transaction in this case appears to be a downstream merger. In our view, reverse acquisitions and downstream mergers should be treated alike for this purpose, but there is no guarantee that a court would accept this view.

If you have further questions, please contact Al Bishop, at FTS 566-3520.

MARLENE GROSS

By:

  
ALFRED C. BISHOP, JR.  
Chief, Branch No. 2  
Tax Litigation Division